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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 425

SEABOARD AIR LINE RAILROAD COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, et al.,

Appellants

v.

UNITED STATES OF AMERICA, FLORIDA EAST COAST RAILWAY COMPANY, et al.,

Appellees

On Appeal from the United States District Court for the Middle District of Florida

JURISDICTIONAL STATEMENT

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Appellants,

v.

UNITED STATES OF AMERICA, FLORIDA EAST COAST RAILWAY COMPANY, *et al.*,

Appellees.

On Appeal from the United States District Court for the Middle District of Florida

JURISDICTIONAL STATEMENT

Seaboard Air Line Railroad Company, Atlantic Coast Line Railroad Company, The Atlantic Coast Line Company, and Mercantile-Safe Deposit and Trust Company, Appellants, appeal from the judgment of the United States District Court for the Middle District of Florida entered May 13, 1965, setting aside certain orders of the Interstate Commerce Commission dated December 2, 1963, and March 4, 1964, which authorized a merger of Atlantic Coast Line Railroad Company into Seaboard Air Line Railroad Company, and submit this statement, in compliance with Rules 13 and 15 of this Court, to show that the Supreme Court of the United States has juris-

diction of the appeal and that the questions presented are substantial.

OPINIONS BELOW

The opinion of the three-judge District Court entered on May 13, 1965, is not yet reported. Copies of that opinion and of the judgment of the District Court of the same date are attached as Appendix A, App. vol. I, pp. 1-18 and 19-20, respectively. The orders of the Interstate Commerce Commission dated December 2, 1963, and March 4, 1964, set aside by the District Court, are attached as Appendices B and C, App. vol. I, pp. 21-23 and 24-27. The report of the Interstate Commerce Commission approving the merger, *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line R. Co.*, appears at 320 I.C.C. 122 (1963). Copies of this report have been furnished for the convenience of the Court. The report of the Commission's Hearing Examiner, incorporated by order of the Commission in its own report, is attached as Appendix E, App. vol. II.

JURISDICTION

This is an action by Florida East Coast Railway Company to set aside orders of the Interstate Commerce Commission (the "Commission") entered under Section 5(2) of the Interstate Commerce Act, 54 Stat. 905, 49 U.S.C. §5(2), approving and authorizing the merger of Atlantic Coast Line Railroad Company into Seaboard Air Line Railroad Company, subject to certain conditions specified in the Commission's orders. The Railway Labor Executives' Association, and the Southern Railway Company and its affiliated companies in the Southern Railway System, intervened as parties plaintiff. The defendant Interstate Commerce Commission, represented by its General Counsel, appeared in support of its orders; the defendant United States of America, represented by the Department of Justice, appeared in opposition to the orders and was realigned

as a party plaintiff. Seaboard Air Line Railroad Company, Atlantic Coast Line Railroad Company, and The Atlantic Coast Line Company, a holding company controlling Atlantic Coast Line Railroad Company, and the Mercantile-Safe Deposit and Trust Company, a trust company which in turn, as fiduciary, controls The Atlantic Coast Line Company, intervened as parties defendant.[1]

The judgment of the court below was dated and entered on May 13, 1965. Notices of Appeal were filed in that court by these appellants on June 9, 1965, and by the Interstate Commerce Commission on July 12, 1965. The jurisdiction of this Court is established by 28 U.S.C. §1253.

The following decisions, among others, sustain the jurisdiction of this Court to review the judgment of the District Court on direct appeal: *Brotherhood of Maintenance of Way Employes* v. *United States,* 366 U.S. 169 (1961); *Minneapolis & St. L. R. Co.* v. *United States,* 361 U.S. 173 (1959); and *McLean Trucking Co.* v. *United States,* 321 U.S. 67 (1944).

STATUTES INVOLVED

The statutory provisions governing the approval by the Interstate Commerce Commission of the consolidation and merger of railroads are contained in Section 5 of the Interstate

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[1]Short name forms will sometimes be used herein as follows:

Coast Line	—Atlantic Coast Line Railroad Company
Commission or ICC	—The Interstate Commerce Commission
Florida East Coast	—Florida East Coast Railway Company
Mercantile	—Mercantile-Safe Deposit and Trust Company
Merged Company	—Seaboard Coast Line Railroad Company, the surviving corporation under the Plan of Merger
RLEA	—Railway Labor Executives' Association
Seaboard	—Seaboard Air Line Railroad Company
Southern	—Collectively: Southern Railway Company, The Alabama Great Southern Railroad Company, The Cincinnati, New Orleans and Texas Pacific

Commerce Act, subparagraphs (2)(a), (2)(b), (2)(c), (2)(f), and (11), 54 Stat. 905, 908, 49 U.S.C. §5(2)(a), (2)(b), (2)(c), (2)(f) and (11), and in the National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding Section 1. The provisions of the antitrust laws relied on by the District Court are contained in Sections 7 and 11 of the Clayton Act, 38 Stat. 731, 734, 64 Stat. 1125, 15 U.S.C. §§18 and 21. The texts of these and other pertinent statutory provisions are set forth in Appendix D, App. vol. I, pp. 32-39, and 29-32, respectively.

QUESTION PRESENTED

The question now presented is:

Did the court below err in setting aside the orders of the Commission which authorized the merger of Coast Line into Seaboard, on the ground that the Commission, in performing its statutory duty to determine whether such a merger is consistent with the public interest under Section 5(2) of the Interstate Commerce Act is required to make findings in specific conformity with those which would have been required if Section 7 of the Clayton Act were applicable, and that the Commission failed to make those findings?

If probable jurisdiction is noted, the following additional questions will be presented:

(a) Was not the Commission's finding that Mercantile, under the circumstances of the case, need not be considered as a carrier under Section 5(3) of the Interstate Commerce Act in order to give the Commission adequate administrative control over Mercantile's relationship to the merged carrier, within its lawful discretion? and;

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[1](continued) Railway Company, New Orleans and Northeastern Railroad Company, Georgia Southern and Florida Railway Company, Carolina and Northwestern Railroad Company, Central of Georgia Railway Company and Savannah & Atlantic Railway Company.

(b) Were not the conditions imposed by the Commission on the merged company to protect the interest of railroad employees affected by the merger in accordance with and adequate under the statute? and;

(c) In view of the full record on these matters and the manifest correctness of the Commission's rulings on them, despite the failure of the court below to pass on them, should not the judgment below be reversed with instructions to dismiss the complaint, and the orders of the Commission be reinstated?

STATEMENT OF THE CASE

Seaboard and Coast Line are interstate railroads. Each operates only in the six states of Virginia, North Carolina, South Carolina, Georgia, Alabama and Florida.

In May, 1960, the Boards of Directors of Seaboard and of Coast Line agreed to a Plan of Merger for the merger of Coast Line into Seaboard, which would be the surviving corporation under the name of Seaboard Coast Line Railroad Company. The Plan was thereafter overwhelmingly approved by the stockholders of each company.

Proceedings Before the Commission. – Seaboard and Coast Line jointly applied to the Commission in July, 1960, for authority to merge pursuant to Section 5(2) of the Interstate Commerce Act. Eighty-six parties who filed 166 pleadings participated in the extensive ensuing proceedings before the Commission. Hearings were held before an Examiner of the Commission in seven cities in the Southeast on 35 hearing days between November, 1960, and July, 1961. The record of those hearings contains 5,729 pages of reporter's transcript, 101 prepared testimony statements containing 1,221 pages, and 271 documentary exhibits.

More than a year after the close of the hearings, and after receiving briefs, the Commission's Examiner, on August 24, 1962, issued an extensive report and recommended order approving the merger upon certain prescribed conditions. (Appendix E, App. vol. II, pp. 226-32). Exceptions and replies were filed with the Commission by various of the parties.

On May 7 and 8, 1963, the case was argued orally before the full Commission. On December 13, 1963, the Commission issued and served an exhaustive report,[2] dated December 2, 1963, setting forth in detail the Commission's reasons for approving the proposed merger. The Commission's order, two Commissioners dissenting, approved the merger subject to certain specified conditions.

The Commission's report, among the other public interest factors,[3] extensively analyzed the competitive factors inherent in the proposed merger, recognizing at the outset of its discussion the obvious fact that: "The proposed merger would result in the elimination of present competition between Seaboard and Coast Line in a 6-state area," (320 I.C.C. at 163). The Commission proceeded to a full analysis of the "intramodal" (rail) competition as it would be affected by the merger. First, it analyzed the quantum of the total tonnage of the two roads that was competitive between them and the portion of that tonnage that would remain subject to competition from other rail carriers after the merger.[4] The Commission observed that,

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[2]In printed form the Commission's report itself covers 148 pages, and the report of the Examiner, which it incorporates by reference, in the form in which we have printed it in the Appendix, covers 268 pages, including appendices.

[3]In addition to considering the public interest factors, the Commission, among other matters, passed on the fairness of the exchange of securities provided for by the Plan of Merger and authorized the issuance of the new securities of the merged company.

[4]The Commission noted that 33.4% of the total tonnage of Seaboard and Coast Line was competitive between them. Of this competitive portion of the two railroads' tonnage, over 65% would remain competitive with other railroads after the merger. (320 I.C.C., at 211)

in terms of points where the merging roads had agents, "there would be only 17 communities outside of Florida which would be without competitive rail service after the merger, and these communities have an average population of approximately 6,500 each." (320 I.C.C, at 164)

The Commission noted that: "Though the merged company will be the biggest railroad in the area, whether measured in terms of revenues, or assets or mileage, it will encounter vigorous competition from other rail carriers. The record here shows that rail competition will exist at every major city with a population in excess of 200,000 except at Tampa." (320 I.C.C., at 164) The Commission further noted that the situation at Tampa and in central and western Florida generally was unique since those areas were served by no other railroads besides those proposing to merge. However, in this connection, the Commission analyzed the peculiarities of the Florida situation in that in terms of points at which Seaboard and Coast Line had maintained agents "the number of Florida points at which there has been no competition [between the two carriers] is about 4 times as great as the number of Florida points at which Seaboard and Coast Line have heretofore competed." (320 I.C.C., at 165)

Observing that: "The impact of this merger, both good and bad, will be felt throughout the southern region and in evaluating its competitive advantages and disadvantages, we must consider the rail service provided by all rail carriers and, in fact, the sum of all of the competitive transportation facilities that will remain available in this broad area" (320 I.C.C., at 166), the Commission proceeded to analyze the competitive effects of the merger in terms of both "intramodal competition" (competition between rail carriers) and in terms of competition with transportation provided by competing forms of carriage.

The Commission's analysis was both in terms of the effect of the merger directly on users of transportation services and

in terms of the effect on other rail carriers. On the latter point, the Commission exhaustively analyzed the claims of diversion of traffic that were made by the various parties before it. The Commission used its administrative powers to balance the competitive situation with respect to the Southern – the principal rail competitor of Seaboard and Coast Line – with particular reference to the origination of traffic that would exist in central and western Florida,[5] where the merger's effects on intramodal competition were obviously most pronounced. The Commission recognized that tariffs presently in effect prevent routing over Southern's lines north of Jacksonville on traffic to and from Florida points on Seaboard and Coast Line (320 I.C.C., at 182). The Commission accordingly ordered the merged company to establish, in conjunction with Southern, joint rates in connection with traffic through the Jacksonville gateway.[6] These rates were to be no higher than the rates applicable over the lines of the merged company itself through the Jacksonville gateway, or via any other gateway. The Commission stated that this condition would make Southern "fully competitive with the merged company with respect to northbound traffic out of Jacksonville." (ibid.) Certain other conditions were imposed to insure the ability of

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[5]Southern's operations in Florida do not extend south of Jacksonville and Palatka which are, of course, in the northeast corner of the state.

[6]Thus, even though prior to the merger, shipments originating in central or western Florida—which would have originated almost exclusively over the lines of either Seaboard or Coast Line—would not have moved north of Jacksonville via Southern, this routing would, under the Commission's condition, become available after the merger. Not only would Southern continue to afford effective competition to the merged company in Virginia, the Carolinas, Georgia and Alabama, but it would become for the first time an important factor in northbound shipments moving from central and west Florida.

other rail carriers to compete effectively with the merged carrier.[7]

The Commission stated that it expected "positive results to flow from consummation of this merger subject to the described conditions." The Commission stressed, "it is important to note that the conditions we have devised represent neither mere acceptance of the minimum concessions offered by the applicants nor full acquiescence in the demands of the intervening rail-

[7]Thus, in order to ensure the maintenance of balanced competition after the merger:

(a) The merged company was required to give the Central of Georgia (a Southern affiliate) trackage rights over the present line of Coast Line from Albany to Tifton, Georgia. This would give Central of Georgia and Southern a continuous route from Birmingham and Montgomery to Jacksonville, and when considered with the condition opening the Jacksonville gateway, the Commission concluded, would not only "be particularly beneficial to Southern and Central" but "also provide a significant volume of interchange trackage for [Florida] East Coast at the Jacksonville gateway." (320 I.C.C., at 183) (Condition 12)

(b) The Coast Line and Seaboard each operate a line between Jacksonville and Quinlan, Florida, an industrial area which includes a large plant of the St. Regis Paper Company. St. Regis and Southern, in order to keep service at Quinlan competitive, requested that the merged carrier be required to sell or lease one of the two lines to Southern, and the Commission imposed this condition. (Condition 11)

(c) The merged carrier was required by the Commission to open new routes with the Norfolk Southern Railway, an east-west carrier operating primarily in Southern Virginia and North Carolina. The merged carrier was ordered to open new routes and maintain joint routes with Norfolk Southern through the Wilson, N. C., Fayetteville, N. C., and Raleigh, N. C., gateways. (Condition 7)

In addition, among other conditions, there were imposed on the merged carrier general traffic conditions ordering the maintenance of all routes and channels of trade via existing junctions and gateways; ordering preservation of neutrality in handling traffic; ordering preservation of present traffic and operating relationships with connecting lines; imposing an obligation to handle the cars of other lines without discrimination; prohibiting interference with the right of industries to select their own routing for traffic; ordering the maintenance of existing freight train schedules, so as to preserve connections with other railroads; and allowing Southern to abandon certain trackage agreements with the merged carrier which might prove to be burdensome to it. (Conditions 1, 2, 3, 4, 5, 6, 9 and 10)

roads, but rather are the product of our exhaustive study of the competitive situation in the Southeast. We are convinced that these routing and gateway conditions will establish two balanced competitive systems in that area and will result in an increase rather than decrease in intramodal rail competition that will contribute to the present and future economic development of this important section of the Nation." (320 I.C.C., at 188)

The principal affirmative factor that the Commission discussed was the well-known competitive growth of modes of transportation other than railroads and its impact on the rail carriers and their ability to serve the public in an efficient and adequate manner. The Commission analyzed the increasing competition, both in terms of passenger transportation and freight transportation, in the southeastern United States, provided by motor, airline, water and pipeline carriers. The Commission gave particular attention to the growth of competitive transportation services available in Florida, and particularly in the Tampa area. Against this backdrop, the Commission noted the declining income of Seaboard and of Coast Line, and the problems associated with their increased operating costs and the problem of their excess "plant" capacity. The Commission reviewed the economies—so relevant to modern, efficient service—to flow from the merger. Meticulously analyzing and to a considerable extent discounting the estimates of economies made by the merger applicants, it nonetheless concluded "that the total savings will be substantial and will approximate our estimate of at least $20 million a year." (320 I.C.C. at 159) The Commission concluded that: "In the light of these and other factors, particularly the accelerated growth of external competition, it is evident that, following the merger, there will be greater assurance of the ability of these railroads to provide efficient, adequate, and improved service to the public in the future." (320 I.C.C., at 153)

Accordingly, the Commission reached a conclusion that: "[I]t is clear that the benefits of this merger, when viewed in the light of the conditions hereinafter imposed, will greatly outweigh the potential injuries and hence the policy underlying the antitrust laws does not represent a barrier to its approval." (320 I.C.C., at 167)

After the receipt of various petitions for reconsideration, the Commission, in an order modifying one of the routing and gateway conditions, denied reconsideration on March 4, 1964. (Appendix C, App. vol. I, pp. 25-27.)

Proceedings in the District Court. — On March 18, 1964, Florida East Coast filed a complaint in the court below to set aside the Commission's orders, and a temporary restraining order issued. Southern and RLEA were granted leave to intervene as plaintiffs; and the Justice Department, answering for the statutory defendant United States, aligned as a plaintiff. Appellants were granted leave to intervene as defendants.

On May 13, 1965, the District Court entered an opinion and judgment setting aside the orders of the Commission.

The decisive factor of the court's opinion was its acceptance of the contention of Florida East Coast that, as a first step in making its determination as to whether the merger should be approved—in the court's words — "the Commission must define the 'line of commerce' and 'section of the Country' in which to appraise the probable competitive effects of the proposed merger and must determine whether the effect of the merger 'may be substantially to lessen competition' or 'tend to create a monoply'." Appendix A, App. vol. I, p. 12.[8]

The District Court admitted that: "On its face this contention may seem contrary to the Supreme Court's decision in

[8]The specified tests are those laid down in Section 7 of the Clayton Act.

McLean Trucking Co. v. *United States*" (321 U.S. 67 (1944)). As the District Court put it: "*McLean* involved the Commission's approval of the consolidation of seven large motor carriers . . . The Court decided that the Commission is not required to decide definitely whether the transaction violates the Sherman Act, but that the Commission's role is to 'estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy'." (Appendix A, App. vol I, p. 7)

However, the District Court then proceeded to distinguish *McLean* on the ground that the challenge to the Commission's decision in that case was made solely on the basis of the Sherman Act, not the Clayton Act.

The District Court then confronted this Court's decision in *Minneapolis & St. L. R. Co.* v. *United States,* 361 U.S. 173 (1959), and admitted that in that case "which considered both the Sherman Act and section 7 of the Clayton Act, the Supreme Court did not expressly direct the Commission to define the relevant market by delineating a service market and a geographical market." The District Court disposed of this difficulty by observing: "However, that case was decided prior to *Brown Shoe Co.* v. *United States,* 1962, 370 U.S. 294." (Appendix A, App. vol. I, pp. 10-11).

Thus, the court below held that this Court's decisions in *McLean* and *Minneapolis* were not governing because the Clayton Act is said to be involved in this case and because of the intervening decision in the *Brown Shoe* case. Following this holding, because the Commission had not phrased its conclusions in terms of the specific standards applicable under Section 7 of the Clayton Act—and for no other reason—the court below

set aside the Commission's order on the grounds that it "failed to make sufficient findings to accommodate section 5(2) of the Interstate Commerce Act with section 7 of the Clayton Act." (Appendix A, App. vol. I, p. 12).

THE QUESTION IS SUBSTANTIAL

In the present case[9] – the District Court took the extraordinary step of determining that the two leading cases of this Court relating to the applicable standards for ICC approval of carrier mergers under Section 5 of the Interstate Commerce Act are no longer controlling.

Such an extraordinary assumption by the District Court would in itself obviously be a ground for plenary review on appeal by this Court. In point of fact, moreover, the ruling of the District Court is plainly erroneous, and unless reviewed and reversed by this Court will cause interminable delays in the various important railroad merger cases now pending before the Commission.[10]

It is conceded by the District Court that neither the Sherman Act nor Section 7 of the Clayton Act is binding on the Commission in its consideration of whether to approve a merger between carriers under Section 5(2) of the Interstate Commerce Act. The basic legislative history makes this plain. In the Transportation Act of 1920–in which the first version of Section 5(2) came into the statute – Congress directed the Commission to "prepare and adopt a plan for the consolidation of

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[9]Appendix A, App. vol. I.

[10]For example, the Pennsylvania-New York Central Merger (ICC Finance Docket 21989, etc.) which is awaiting argument before the Commission on the Examiner's report of February 26, 1965 and the Great Northern-Northern Pacific-Burlington Merger (ICC F.D. 21478, etc.) which was argued before the Commission on June 16-17, 1965, and is now awaiting decision by the Commission.

the railway properties of the continental United States into a limited number of systems." 41 Stat. 481. The antitrust laws, which previously had been applicable in plenary fashion to mergers between rail carriers,[11] were superseded in the case of mergers approved by the Commission.[12]

The Commission was unable to formulate and put its administrative master plan into effect during the 1920's and 1930's, and by 1940 it was obvious, as this Court put it, that "the ambitious nation-wide plan of consolidation was not bearing fruit," and "that it was a case where the best was an enemy of the good, and waiting for the perfect official plan was defeating or postponing less ambitious but more attainable voluntary improvements." *Schwabacher* v. *United States*, 334 U.S. 182, 193 (1948). Accordingly, Congress provided, in the Transportation Act of 1940, a new scheme dealing with the desired end of consolidating the country's rail systems—the present Section 5(2). This provision relieved the Commission of its duty to promulgate a master plan, but instead authorized and directed the Commission to approve carrier-instituted voluntary plans of merger if the plans meet certain tests laid down in the statute. Congress' purpose was plain; as this Court has reiterated: "The congressional purpose in the sweeping revision of §5 of the Interstate Commerce Act in 1940, enacting §5(2)(a) in its present form, was to facilitate merger and consolidation in the national transportation system." *County of Marin* v. *United States*, 356 U.S. 412, 416-18 (1958); *Brotherhood of Maintenance of Way Employes* v. *United States*, 366 U.S. 169, 173 (1961).

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[11] See e.g., *Northern Securities Company* v. *United States*, 193 U.S. 197 (1904); *United States* v. *Union Pacific R. Co.*, 226 U.S. 61 (1912); *United States* v. *Reading Co.*, 253 U.S. 26 (1920); *United States* v. *Lehigh Valley R. Co.*, 254 U.S. 255 (1920).

[12] The 1920 Act brought the provisions of Section 5(11), then numbered Section 5(8), into the Act. 41 Stat. 482.

Section 5(2) of the Act is explicit. Subdivision (a) provides that: "It shall be lawful, with the approval and authorization of the Commission . . . for two or more carriers to consolidate or merge their properties or franchises . . ."

Subdivision (b) ordains that if the Commission "finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction . . . will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable . . ." And subdivision (c) articulates standards which the Commission is to take into account in determining whether the proposed merger would be consistent with the public interest: "In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transactions upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected."

Paragraph (11) of Section 5 is equally explicit as to the consequences of the exercise of the Commission's authority to approve these carrier mergers. That provision declares that: "The authority conferred by this section shall be exclusive and plenary, . . . and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the anti-trust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved . . ."

This Court, applying the provisions of Section 5(2) added by the 1940 Act, early rejected a contention that the Commission, in considering approval of a merger between competing carriers under Section 5(2), was required to apply the Antitrust laws, specifically the Sherman Act. *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944). Speaking for the Court, Mr. Justice Rutledge observed:

> "To secure the continuous, close and informed supervision which enforcement of legislative mandates frequently requires, Congress has vested expert administrative bodies such as the Interstate Commerce Commission with broad discretion and has charged them with the duty to execute stated and specific statutory policies. That delegation does not necessarily include either the duty or the authority to execute numerous other laws. Thus, here, the Commission has no power to enforce the Sherman Act as such. It cannot decide definitively whether the transaction contemplated constitutes a restraint of trade or an attempt to monopolize which is forbidden by that Act. The Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems. That legislation constitutes the immediate frame of reference within which the Commission operates; and the policies expressed in it must be the basic determinants of its action." (321 U.S., at 79-80)

> "Whatever may be the case with respect either to other kinds of transactions by or among carriers or to consolidations of different types of carriers, there can be little doubt that the Commission is not to measure proposals for all-rail or all-motor consolidations by the standards of the anti-trust laws. Congress authorized such consolidations because it recognized that in some circumstances they were appropriate for effectuation of the national transportation policy. It was informed that this policy would be furthered by 'encouraging the organization of stronger units' in the motor carrier industry. And in authorizing those consolidations it did not import the general policies of the anti-trust laws as a measure of their permissibility." (*Id.*, at 84-85)

"In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy. Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission 'to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, but in its coordination of all other forms.' 79 Cong. Rec. 12,207. 'The wisdom and experience of that commission', not of the courts, must determine whether the proposed consolidation is 'consistent with the public interest'." [citing cases] (*Id.*, at 88)

And only recently the Court once again considered and rejected similar contentions, urged this time on the basis of Section 7 of the Clayton Act,[13] in an attempt to set aside a

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[13]The acquisition was proposed, and Commission approval sought, in 1955. Consequently, §7 as amended by the Celler-Kefauver Act of 1950 was the relevant version of the Act. Incredibly, the court below held that in *Minneapolis* this Court had only considered the pre-1950 version of Section 7. See Appendix A, vol. I, p. 11, n. 32. Why the Court would have restricted its consideration to the pre-1950 version of the statute when all the relevant events occurred at last five years after the passage of the 1950 Amendment is mysterious. The reference given by the District Court for its extraordinary conclusion is footnote 11 of the opinion in *Minneapolis*. That footnote is simply a citation for §7 and reads in its entirety: "15 U.S.C. §18; 38 Stat. 731." Presumably from Mr. Justice Whittaker's citation practice of citing simply the original Statute-at-Large reference for an amended statute, the court below assumed that this Court was disregarding the relevant subsequent amendments.

Footnote 10 of the opinion in *Minneapolis* cites Section 1 of the Sherman Act as: "15 U.S.C. §1, 26 Stat. 209." Section 1 of the Sherman Act has, of course, been amended since its passage at 26 Stat. 209 in 1890 on two occasions, once in 1937 and again in 1955. Perhaps the District Court, if confronted with the problem, would assume from this reference that the Supreme Court in 1959 was not yet prepared to take into account the 1937 amendment to Section 1 of the Sherman Act.

railroad acquisition approved by the Commission pursuant to Section 5(2) of the Act. *Minneapolis & St. L. R. Co.* v. *United States,* 361 U.S. 173 (1959). There the Court reiterated and entirely reaffirmed the standards governing Commission action set forth in *McLean.* It reiterated that the Commission's power under Section 5 is—as that section provides—"exclusive and plenary"; that while "the preservation of competition among carriers [is] . . . still a value," it is "significant chiefly as it aids in the attainment of the objectives of the national transportation policy"; and that the Commission "is not to measure proposals for [acquisitions] by the standards of the antitrust laws." (361 U.S., at 185.)

The court below, nonetheless, held that this Court's decisions in *McLean* and *Minneapolis* were no longer appropriate standards for Commission evaluation of the competitive impact of a merger. Accordingly, it set aside the Commission's order solely because the Commission did not literally follow the specific techniques and make the specific findings required in a case governed by Section 7 of the Clayton Act as elaborated in the *Brown Shoe* case—despite the conceded substantive inapplicability of Section 7 to this case.

The court below gave two reasons for disregarding the teaching of *McLean* and *Minneapolis:*

(a) First, the court below isolated the Court's language in *McLean* that "the Commission has no power to enforce the Sherman Act as such." (321 U.S., at 79) Against this, it cited the provision of Section 11 of the Clayton Act: "Authority to enforce compliance with Sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act. . . ."—On this basis, it held that a different result was required where a question under Section 7 was raised as to a railroad merger.

But the lower court's rationale simply begs the question. Section 11 is one of the procedural provisions of the Clayton Act, providing for dual public enforcement of the provisions of the Act both through administrative proceedings before specified agencies (Section 11) and by suits prosecuted by the Justice Department (Section 15).[14] Passed the month after the Federal Trade Commission Act, it vested authority to hold administrative proceedings to enforce the Clayton Act in the FTC in the case of corporations generally, and in the Interstate Commerce Commission, the Federal Reserve Board, and—as later amended, the Federal Communications Commission and the Civil Aeronautics Board—as to corporations within their general jurisdiction. However, it only vests authority in the Commission to enforce the Clayton Act "*where applicable* to common carriers"; and it offers no guide as to the substantive applicability of the Clayton Act to transactions involving railroads."[15]

At present, the only substantive provision of the Clayton Act as to the applicability of Section 7 to mergers between railroads is the provision of the final paragraph of Section 7 to the effect that: "Nothing contained in this Section shall apply to transactions duly consummated pursuant to authority given by the . . . Interstate Commerce Commission . . . under any statutory provision vesting such power in such Commission . . ." Thus, the fact is, to the extent that mergers involving railroads are the subject of approval by the Interstate Commerce Commission—as mergers between railroads currently are under Section 5(2) of the Interstate Commerce Act—Section 7 of the Clayton Act is not in terms applicable to them; and the Commission has no substantive provision of the Clayton Act to enforce.

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[14] 38 Stat. 736 (1914), as amended, 15 U.S.C. §25.

[15] When Section 11 was passed, railroad mergers and acquisitions were fully subject to the antitrust laws. That situation was, as developed above, drastically changed by the Acts of 1920 and 1940.

Section 11's function is this: At the present time, and from time to time during the history of Section 11, there have been mergers and acquisitions involving rail carriers as to which the Commission would have no "approval" power or as to which the Commission's "approval" power was not invoked. As to these, the Commission has the administrative jurisdiction—corresponding to the familiar jurisdiction of the FTC as to corporations generally—to enforce Section 7[16]. The FTC's power, like the ICC's powers as to those mergers and acquisitions as to which it does not have approval powers, is an administrative power of enforcement of a prohibitory statute, not a regulatory power in the strict sense. For example, at the present time, vertical or conglomerate acquisitions by rail carriers as to which the Commission has no approval power under Section 5, would be subject to its power specifically to enforce Section 7 as such.[17] But the point is that the Commission's procedural authority to apply Section 7 in the limited cases in which it is substantively applicable to railroads does not change the teaching of the *McLean* case—specifically reiterated as to Section 7 in the *Minneapolis* case—that the Commission's functions in the case of a merger between carriers under Sec-

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[16]See, *e.g.*, *Transamerica Corp* v. *Board of Governors*, 206 F.2d 163 (3d Cir. 1953), *cert. denied*, 346 U.S. 901 (1953), involving the Federal Reserve's administrative enforcement of Section 7.

[17]During the six years between the passage of the Clayton Act and the Transportation Act of 1920, all acquisitions by rail carriers meeting the language of Section 7 would have been in that category; and in the years after the passage of the Act of 1920, acquisitions which had not been brought to the Commission for approval were repeatedly held subject to its challenge under Section 7. See *ICC* v. *Pennsylvania R. Co.*, 169 I.C.C. 618, 642 (1930), *reversed on other grounds*, 66 F.2d 37 (3d cir. 1933); *ICC* v. *Baltimore & O. R. Co.*, 160 I.C.C. 785 (1930); *ICC* v. *Baltimore & O. R. Co.*, 152 I.C.C. 721 (1929). The necessity for the Commission to use its powers under Section 7 in this precise context was removed in 1933 when the provision which is now Section 5(7) of the Interstate Commerce Act was added. 48 Stat. 217. This provision prohibits effecting without Commission approval transactions of the nature which the Commission is authorized to approve under Section 5.

tion 5(2) of the Interstate Commerce Act do not consist of specifically applying the substantive provisions of the antitrust laws.

(b) Second, the lower court—presumably embarrassed by the fact that the *Minneapolis* case itself involved Clayton Act Section 7—held that the *Brown Shoe* decision in 1961 somehow changed the rules applicable to mergers between rail carriers. The point is so clearly wrong as not to require extended discussion. The *Brown Shoe* decision did not invent amended Section 7 of the Clayton Act. That Act had been on the books in its present form since the passage of the Celler-Kefauver Act of 1950, nine years before the *Minneapolis* case.[18] In the first place, it is mysterious how the development of doctrine under Section 7 of the Clayton Act has decisional impact upon a case in which Section 7 is concededly not governing. And, in any event, the concept that, in an action against a merger under the prohibitory provisions of Section 7, an essential task is the determination of the relevant market or submarkets was not one originated by *Brown Shoe*, and it turns the history of the development of antitrust doctrine on its head to say so. *Brown Shoe* was rather a specific application of standards quite expressly stated in the Clayton Act,[19] and articulated by this Court in a long line of decisions culminating in *United States* v. *DuPont de Nemours & Co.*, 353 U.S. 586 (1957) (*"General Motors"*), which was decided two years before *Minneapolis*: "Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act: . . ." (*Id.*, at 593) The tests which the District Court thought *Brown Shoe* discovered have been implicit and explicit in antitrust cases for years: See *United States* v. *Bethlehem Steel Corp.*,

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[18] See note 13, *supra*.

[19] Amended Section 7 of the Act prohibits mergers "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

168 F. Supp. 576, 583 (S.D.N.Y. 1958) (Clayton Act §7); *Standard Oil Co.* v. *United States*, 337 U.S. 293 (1949) (Clayton Act §3); *Van Camp & Sons* v. *American Can Co.*, 278 U.S. 245 (1929) (Clayton Act §2); *Standard Oil Co.* v. *United States*, 221 U.S. 1, 61 (1911);[20] *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co.*, 293 U.S. 268, 279 (1934); *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947); *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 172-73 (1948); *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948); *Times Picayune Pub. Co.* v. *United States*, 345 U.S. 594 (1953); *International Boxing Club* v. *United States*, 358 U.S. 242, 251 (1959) (Sherman Act).

The District Court's rejection of the teaching of this Court's decisions in the *McLean* and *Minneapolis* cases was accordingly effected on patently erroneous grounds and furnishes a clear basis for this Court's assumption of jurisdiction on appeal.

2. Moreover, the need for this Court to assume jurisdiction over this appeal is underscored by the fact that the Commission's report, set aside by the lower court for failure to make the sort of findings which would have been appropriate in a case under Section 7 of the Clayton Act, was executed in scrupulous conformity to the command of Section 5(2) of the Interstate Commerce Act and of the decisions of this Court under it in *McLean* and *Mineapolis*. – The court below did not examine the adequacy of the Commission's findings in the light of the standards of this Court's decisions in those cases. But had it done so it could not have escaped the conclusion that the Commission not only made specific, detailed and incon-

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[20] "The commerce referred to by the words 'any part' construed in the light of the manifest purpose of the statute has both a geographical and a distributive significance; that is it includes any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce." (221 U.S., at 61)

testable findings as to the special standards of Section 5(2)(c), but that it "estimated" and "appraised" the competitive effects of the merger, and "gave weight to antitrust policy," in great detail, and through the use of powers which were specifically relevant to the Commission's regulatory regime.

Unlike similar regulatory statutes[21]—and indeed unlike certain other aspects of the Interstate Commerce Act[22]—the factor of preservation of competition is not expressly listed by Congress among the factors which the Commission must evaluate in considering approval of a merger under Section 5(2). Indeed the statute—and the history of legislation in this field—indicate clearly that Congress contemplated and expected that the rail consolidations which it sought to foster by the Transportation Acts of 1920 and 1940, would eliminate competition in some degree. In fact, appropriate elimination of duplicating facilities caused by the overbuilding of the American railroad system was one of the goals sought by Congress.

Nonetheless, the decisions of this Court in *McLean* and *Minneapolis* teach that the competitive policy underlying the antitrust laws—though not the specific technical terms of those laws—must be taken into account by the Commission, and ac-

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[21]The somewhat similar provision of Section 408 of the Federal Aviation Act, 49 U.S.C. §1378, which governs mergers or consolidations involving air carriers, and as to which there is an exemptive provision from the antitrust laws as to transactions approved by the CAB, somewhat similar to that provided in Section 5(11) of the Interstate Commerce Act (Section 414 of the Federal Aviation Act, 49 U.S.C. §1384), contains an express provision: "that the Board shall not approve any [transaction] . . . which would result in creating a monopoly or monopolies and thereby restrain competition . . ."

[22]Section 5(2)(b) of the Interstate Commerce Act provides that acquisitions of motor carriers by rail carriers may not be approved by the Commission under Section 5(2) unless the Commission finds that the transaction "will not unduly restrain competition." No similar expression is contained in the Act as to mergers between rail carriers. The Transportation Act of 1940, in fact, deleted a provision along these lines which had been inserted by the 1920 Act.

commodated with other factors, in passing on a merger under Section 5(2). The Commission laboriously did so here. The issue, then, is *not* whether the Commission must evaluate the competitive effects of the merger as part of determining whether it is "consistent with the public interest"—the applicable statutory standard of Section 5(2)(b). Of course it must; and there is no claim that in the present case the Commission failed to comply with the standards prescribed in *McLean* and in *Minneapolis;* that it "estimate" and "appraise" and "give weight to" the effects of the merger on competition and to "antitrust policy." The Commission thoroughly complied. It made an examination—so extensive as to dwarf that made in the *Minneapolis* case[23]—of the competitive effects of the merger; of the rail competition which would be presented after the merger; of the special situation presented as to rail transportation in central and western Florida; as to the competitive aspects of other modes of transportation. It prescribed important and unprecedented conditions on its approval of the merger in order to protect and to foster balanced intramodal competition in certain respects that it deemed advisable in view of the impact of the merger. The Commission's reference to its "extensive study of the competitive situation in the southeast" was far from an immodest one.

The Commission found that the merger would result in the elimination of duplicating services and facilities, would reduce costs, would maximize the use of railroad properties and increase the overall efficiency of operations, and would promote safe, adequate, economical and efficient service. It found that, with the conditions attached, two balanced competitive rail systems in the Southeast would be established and that this would further the National Transportation Policy. As to the specific question of the competitive effects of the merger, the

[23]In the *Minneapolis* case, the Commission's discussion of the competitive factors covered only five printed pages.

Commission found as to intermodal transportation that the merged company would be able more effectively to meet the rapidly growing and intense competition of other modes of transportation in the area. And, as to intramodal competition, the Commission found that the advantages of the merger would far outweigh such curtailment of competition as might result.[24]

The Commission accordingly fully and completely discharged the duty imposed upon it by Congress in this area. The requirement of the District Court that the Commission make the technical findings which would have been appropriate had Section 7 of the Clayton Act been applicable to the case is thus a purely gratuitous one, which finds no justification in the governing statutes or in this Court's decisions.

3. Finally, the adverse effects on the administration of the merger provisions of the Interstate Commerce Act that necessarily attend the requirement imposed by the District Court—and its utter incompatability with the realities of transportation regulation and the Commission's regulatory regime under Section 5(2)—furnish a final ground for the Court's assumption of jurisdiction here.

The technique of defining a precise product market and a precise geographic market is, of course, relevant and indispensable in a case under the provisions of Section 7 of the Clayton Act. Section 7 is a prohibitory statute. Where "in any line of

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[24] Thus, the Commission concluded that:

"For these reasons and weighing all the factors previously discussed, plus the further consideration that railroads today encounter increasingly strong competition from other modes of transportation, we conclude and specifically find that (1) the reduction of rail competition caused by the proposed merger will not be substantial; (2) ample competitive rail service will remain after the merger throughout most of the affected area, and (3) such reduction in competition as will result from the merger will have no appreciably injurious effect upon shippers and communities." (320 I.C.C. at 167).

commerce in any section of the country" the acquisition which is challenged might have the effect of "substantially . . . lessen-[ing] competition," it is prohibited. *Brown Shoe,* 370 U.S., at 337. It does not matter that because of countervailing factors the overall effect of the acquisition or merger may be salutary,[25] or that there may be other markets in which there is no effect on competition or in which the effect of the merger may be to stimulate competition. Once a market is defined in which the merger has the probable effects specified in the statute, inquiry is at an end.

But under the regulatory, rather than prohibitory, approach of Section 5(2) of the Interstate Commerce Act, it is not conclusive that the merger has the effect of substantially lessening competition in a relevant product and geographical market, or in ten or twenty such markets, or even, if it could be imagined, in every market affected by the merger. For it is indisputable and undisputed in this case that the Commission might still lawfully approve the merger even if it were to follow the procedural approach envisioned by the District Court and find that there was a probability of the lessening of competition in one or a number of defined markets. Indeed, it was clearly envisioned by Congress, in the National Transportation Policy, that considering rail competition alone, the elimination of considerable competition by way of merger was desirable.

The approach followed by the Commission is, then, obviously the only meaningful one that could be followed in terms of Section 5(2) of the Interstate Commerce Act. The Commission is to form an overall judgment as to the relationship of the merger to the public interest. One of the factors implicit in the public interest is the repeatedly declared policy of Congress of "encouraging the organization of stronger units' in the

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[25] See *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 371 (1963).

. . . industry." *McLean*, 321 U.S., at 84; *Minneapolis*, 361 U.S., at 187. This factor, when taken with the Commission's avowed purpose of giving the necessary weight to the preservation of balanced rail competition, fully warrants the approach of the Commission in analyzing the merger in terms of the overall competitive position in the region—though not without particular attention to specific problem areas like Florida—rather than following the rubrics of a trial under Section 7 of the Clayton Act. Once again, this Court's repeated statement that the Commission is to "estimate," "appraise," and "give weight to" the effect of the merger on competition is not a mandate to convert a proceeding under Section 5(2) into a series of antitrust trials.

Finally, the administrative burdens imposed by the procedural two-step ordered by the court below are potentially staggering. Merger proceedings before the Commission are already most protracted in nature, as the history of this case suggests. It might well be that the lifetime of man would not be sufficient to accommodate the proof as to the competitive effect of a rail merger in each "line of commerce" in each "section of the country," as the application of the specifics of Section 7 of the Clayton Act would demand. And the irony is that after all this proof was put in it concededly would not be controlling. Indeed, the details as to the consequences in each individual market might well be entitled to only minimal consideration in view of the main thrust of the Commission's responsibility to make an overall judgment about the merger, and the inescapable facts of the railroad situation.

In a relatively simple situation like that in *Brown Shoe*, involving a single generic product, proof of the relevant market—the lines of commerce and the sections of the country—affected by the acquisition is manageable although frequently perplexing and almost invariably time-consuming. But in the case of

a merger of competing railroads, the task is staggering to contemplate.

If the Section 7 tests were to be applied in terms to a rail carrier merger, there would first have to be a definition of each of the "relevant markets" in terms of the "lines of commerce" and the geographic areas constituting each market; and then there would have to be market-by-market evidence and findings as to the competitive effect of the merger. – It is hard to imagine anything more local than the provision of transportation services; if they are not locally available they are irrelevant. A shipper at Brunswick, Georgia, is hardly helped by the fact that there is a railroad serving Atlanta. Only those railroads—or other carriers—competing for traffic in the Brunswick area make any impact upon him. Thus, in the rubric of Section 7 there might well be scores of relevant geographic markets involved in any rail merger of any real size. The matter is further complicated when the question of destination points is considered. It might well be argued that every set of origination and destination "city pairs" between which there is a substantial amount of commerce is a geographic market in terms of the specifics of Section 7.[26]—And whatever disposition was finally reached as to the question of definition of the markets involved, presumably evidence on all theories would be offered and received, with resultant proliferation of the proceedings.

Presumably "transportation service" is the line of commerce involved. But since transportation service could not be con-

[26]Seaboard and Coast Line offer directly competing service at 121 cities and participate in service to thousands of points beyond their lines. Simply taking the cities which are directly served by the carriers, it is mathematically possible to construct 7,260 different city pairs in terms of origination and destination from these 121 cities. The next step, on this approach, would be to determine which of these "city pairs" constitute significant markets; and to determine which of a staggering number of possible "city pairs" between the 121 on-line and an enormous number of off-line origination and destination points are significant markets in terms of the railroads involved in the merger.

sidered in a vacuum it might well be that each type of commodity or product which is carried would have to be identified in relation to each specific geographic point. Furthermore, if it is held that the relevant market includes intermodal transportation—road, water, air and pipeline[27] alternatives—the various alternatives would have to be identified for each commodity group at each origination area and from each such origination area to each destination point. As indicated, in a case under Section 7 of the Clayton Act, once it was established that the proscribed effects on competition were present in *any* market, inquiry would be at an end. But all these alternatives would have to be canvassed in a rail merger case, under the two-step procedure mandated by the court below, since the finding of a proscribed effect in any such market would not be the end of the inquiry, but scarcely the beginning.

Clearly a decision which imports procedural techniques of such profound irrelevance and with such potentialities for endless administrative delay[26] warrants this Court's review on appeal, even apart from the flat and admitted repugnance of the decision below with this Court's earlier decisions relating to Section 5(2) of the Act.[29]

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[27]Or, in the case of utility coal, the long distance transmission of electrical energy—"coal by wire."

[28]This case has already spent 44 months in the hands of the I.C.C.

[29]Should probable jurisdiction be noted, we will present to the Court two other points raised before the District Court by plaintiffs, which the District Court declined to pass on in view of its reversal of the Commission's order. These points are (1) whether the Commission properly exercised its discretion in determining that the acquisition by Mercantile of the indirect power to control the merged company would be consistent with the public interest without requiring Mercantile to be considered a carrier under Section 5(3) of the Interstate Commerce Act; and (2) whether the conditions imposed by the Commission to protect the interests of the railroad employees were adequate, were in accord with the provisions of the Interstate Commerce Act, and were supported by proper findings. We shall argue to the Court that these points are ripe for adjudication, and that in the light of the manifest correctness of the Commission's rulings as to them, this Court should pass on them itself and order the complaint in the District Court dismissed and the Commission's orders reinstated.

CONCLUSION

For the reasons stated, probable jurisdiction should be noted.

Respectfully submitted,

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